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In The
SUPREME COURT OF THE UNITED STATES

No. 1164

ELDRIDGE PETE BISHOP,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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ELDRIDGE PETE BISHOP,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment and the United States Court of Appeals for the Tenth Circuit entered in the above case on the 6th day of January, 1970.

CITATIONS TO OPINIONS BELOW

The decision of the United States District Court for the Northern District of Oklahoma is not reported. The opinion of the United States Court of Appeals for the Tenth Circuit printed in the appendix hereto is reported in the ____ F.2d ____.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, U.S.C. 1254 (1) and Rules of the Supreme Court—Rule 19.

QUESTIONS PRESENTED

The Trial Court and Appellant Court erred when they failed to follow rules laid down by the U. S. Supreme Court in regard to allowing Petitioner evidence placed before the Grand Jury.

Failure of the Courts to allow Petitioner to cross-examine the Government's chief prosecuting witness thoroughly and failure of the Government to cooberate an accomplice's testimony when such testimony has been impeached by reputable witnesses.

STATEMENT OF FACTS

The Petitioner was convicted by a jury in the United States District Court for the Northern District of Oklahoma for the crimes of "intent to defraud; delivery and conspiring to attempt to sell counterfeit $100.00 Federal Reserve notes;" on the 3rd day of January, 1967, through the 24th day of January, 1967. The chief Government witness was one Dors Lee Hill who participated in all activities of the sell and delivery of the counterfeit $100.00 Federal Reserve notes between the period of January 3, 1967, and through to January 24, 1967. The Petitioner took the stand in his own defense and produced three witnesses, none of whom had a criminal record, and whose testimony was in direct conflict with the testimony given by the Government's chief witness and said witnesses for Petitioner placed the Petitioner at a different place at the time of the alleged delivery and intent to defraud on the 24th day of January, 1967.

On the 21st day of May, 1968, the Petitioner was sentenced to fifteen (15) years imprisonment on Count 1 of the indictment; ten (10) years on Count II of the indictment, both sentences to run concurrently and five (5) years on Count III of the indictment, such sentence to run con-

secutively to the punishment ordered in Counts I and II of the indictment. The Petitioner appealed his judgment and sentence to the United States Court of Appeals, Tenth Circuit, which said judgment and sentence was affirmed on the 6th day of January, 1970.

PROPOSITION I

ERROR OF THE TRIAL COURT IN OVERRULING PETITIONER'S MOTION FOR DISCLOSURE OF MATTERS OCCURING BEFORE THE GRAND JURY, AND MOTION TO DISMISS.

The Petitioner filed a motion prior to trial for the Government to disclose matters occurring before the Grand Jury and at that time the Court was advised that the testimony taken before the Grand Jury was not transcribed so was unable to present the Petitioner with the occurrences before the Grand Jury. When the Government failed to produce matters occurring before the Grand Jury by reason of its failure to transcribe same, the Petitioner moved to dismiss the indictment which was overruled by the Trial Court. (C-m. 4 & 5)

Here it should be noted that the grand jury is an arm of the court, not an arm of the plaintiff, the United States Government. The constitution itself makes a grand jury a part of the judicial process. The proceedings before a grand jury constitute a judicial inquiry. *Cobbledick v. U. S.*, 309 U. S. 323, 60 S. Ct. 540, 84 L. Ed. 783. It therefore follows that, strictly speaking, the defense is here seeking a disclosure, not from the Government, but from the court itself, which obviously should treat the parties alike in their rights to relevant testimony. It should be noted here that the Petitioner does not have any say as to how the grand jury is conducted. Even though the grand jury is an arm of the

court, it is usually under the court's control, but under the guidance of the district attorney's office.

Although there is no statute requiring the minutes of the grand jury to be transcribed, we must turn to cases that refer to grand jury proceedings to show that from statements made it has been assumed that grand jury minutes have been transcribed as a matter of law. See *U. S. v. Proctor & Gamble*, 356 U. S. 677, 78 S. Ct. 983, 2 L. Ed. 2d 1077; *Pittsburgh Plate Glass Co. v. U. S.*, 360 U. S. 395, 79 S. Ct. 1237, 3 L. Ed. 1323; *U. S. v. Socony Vacuum Oil Co.*, 310 U. S. 150, 84 L. Ed. 1129, 60 S. Ct. 811; and *Dennis v. U. S.*, 384 U. S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 973. All of these cases mention disclosure of grand jury testimony and the minutes thereof as a matter or right under certain circumstances. The writer of this brief is of the opinion that the grand jury minutes of its witnesses' testimony were not inadvertently overlooked by the District Attorney's office but on the contrary were deliberately not recorded in order to defeat the granting of any motion of the Petitioner to produce testimony taken before the grand jury which indicted him. To allow the District Attorney or the Court who has control of the grand jury to defeat the rights of the appellant to testimony taken before the grand jury would be to deprive the appellant of his rights of discovery as provided for by the Fifth Amendment of the United States Constitution. As in all the aforementioned cases, the words, "the ends of justice require", appear throughout. Is the District Attorney's office allowed to defeat this right of discovery by not having the grand jury minutes recorded and to keep all of the testimony produced therein to himself rather than have to produce it as he would be required to do under the recent decision of the Supreme Court?

In the case of *Dennis v. United States* (1966), 384 U. S.

855, 86 S. Ct. 1840, 16 L. Ed. 2d 973, the Supreme Court, at p. 987, stated:

> "Because petitioners were entitled to examine the grand jury minutes relating to trial testimony of the four government witnesses, and to do so while those witnesses were available for cross-examination, we reverse the judgment below and remand for a new trial."

The court recognized the Petitioner's right to examine the minutes relating to the trial testimony.

The Circuit Court of Appeals for the Tenth Circuit has recognized the validity of this right in *Cargill v. United States*, No. 8566, decided in the August, 1967 term, when the court stated:

> "Under this opinion (Dennis), it appears that the defense is entitled to the Grand Jury transcript of the witness's testimony when the Jury's (Grand) functions are ended, * * *"

The appellant is aware of *Campbell v. United States*, 368 F. 2d 521, which cites as its authority for the proposition that when grand jury minutes are not kept that this presents an exception to the *Dennis* ruling, the case of *Welch v. U.S.*, decided August 9, 1966, 371 F. 2d 287, 398, 18 AFTR 2d 5029. It should be noted that the court in *Welch* cited no authority for its statement that these conditions created an exception to the rule announced in *Dennis*.

The Petitioner submits that there is no exception to the *duty being correlative* to the *right* and that the Government cannot defeat the right of the Petitioner by its failure to cause a transcript to be made of the proceedings. The appellant further submits that the breach of this duty by the Government is fatally defective to the validity of the indictment.

PROPOSITION II

THE TRIAL COURT ERRED IN LIMITING DEFENSE COUNSEL'S CROSS EXAMINATION OF THE GOVERNMENT'S CHIEF WITNESS, HILL.

The chief Government witness, Hill, testified that he was found guilty of possession of counterfeit money and sale of counterfeit money by a United States District Court for the Northern District of Oklahoma, and received sentences of ten (10) years on one count and fifteen (15) years on the other count. The two sentences to run concurrently. Hill then was charged with possession of stolen money orders and the Dyer Act and subsequent to his being sentenced, at a later date he entered pleas of guilty to the two (2) charges and was sentenced to a term of ten (10) years on the stolen money orders and five (5) years on the Dyer Act; the sentences to run concurrently with the previous concurrent sentences stemming from the charges of counterfeit money. At the same time, he was given the later two sentences the complete sentence of fifteen (15) years concurrent was reduced to five (5) years, four months and four days by the Honorable Luther Bohannon who had previously sentenced the witness Hill on his conviction and pleas of guilty (C-m. 44-45). It was brought out by the defense counsel that from the date of Hill's conviction and sentence on the possesion of counterfeit money and during the interim of entering his plea of guilty to possession of stolen money orders and the Dyer Act, the witness Hill made several statements to Government officials which resulted in the Petitioner's being indicted in the case at bar. When defense counsel attempted to cross-examine the witness Hill as to what his interest and reasons for making the statements, the Court intervened and stopped defense counsel from pursuing this line of questioning (C-m. 46-91-92), to-wit:

(C-m. 46)

"Q. Yes, sir. And after you made those statements your sentence was cut to five years, wasn't it?

A. Yes, it was cut.

Q. Yes, sir. And those statements involved these defendants, did they not?

A. That statement?

Q. Yes.

A. Yes.

Q. In other words, you sold them out for ten years, didn't you?

MR. RITCHIE: If the Court please, I think that's a little bit——

THE COURT: The Court overrules the objection.

Q. (By Mr. Page) In any event, you did have an interest in your statement, didn't you?

A. Yes.

Q. Yes, sir. All right. That was to try to save you some time, that's why you made that statement?

THE COURT: Well, I think that brings the Court into this play, Mr. Page. To the jury, I want to say that the sentence was reduced, not for anything that he ever said or did, but it was reduced at the time he entered a plea of guilty to the Dyer Act and to the postal money orders, more because of his naval record, as I remember it, and that has been almost a year ago, and because of his health."

(C-m. 91-92)

"Q. And then after you were convicted in this court and given fifteen years, thereafter it was reduced to five years, and all of these crimes, five years, four months, three days?

THE COURT: Hasn't that all been before the jury?

MR. BRIGGS: Yes, your Honor, it has.

THE COURT: What is the point? The jury understands that.

MR. BRIGGS: I want to ask him when it was that he decided, your Honor, that he could trade somebody else's liberty for his own.

THE COURT: Now wait a minute. Now wait a minute. Let's keep the record straight. He hasn't traded anybody's liberty for anybody. The Court made that on the Court's own motion.

MR. BRIGGS: I understand that, your Honor.

THE COURT: I don't want any more of that kind of talk, and I am not going to have it. You understand?

MR. BRIGGS: I understand, your Honor.

THE COURT: I reduced this sentence and I told you why, and I did it in open court.

MR. BRIGGS: Yes, your Honor.

THE COURT: And I haven't talked to anyone about this lawsuit; and don't you say anything like that any more.

MR. BRIGGS: No, your Honor, and I don't—please, I don't want the Court to misunderstand. I don't think——

THE COURT: (Interposing) I don't want to be misunderstood either.

MR. BRIGGS: I do not think the Court was informed at the time when the sentence was reduced with reference to these other matters.

THE COURT: I know why I reduced it.

MR. BRIGGS: Yes, your Honor.

THE COURT: And I reduced it in my own heart on the own circumstances and the own record.

MR. BRIGGS: I understand your Honor.

THE COURT: Not anything that he said to anybody at any time at any place."

The Court further advised counsel prior to final arguments to stay away from insinuating the sentence reduction given Hill was in any way a trade for his testimony and that if they proceed to ignore the advice of the Court they would be called down (C-m. 320). Petitioner asserts that in limiting defense counsel in its cross-examination of the chief Government witness was in the trial Court's discretion and in violation of appellant's rights provided under the 6th Amendment to the United States Constitution. Petitioner thinks that the unfortunate result of this procedural straightjacket was to deprive the Petitioner of reasonable opportunity to explore the credibility, recollection or bias of the Government's primary witness. As was stated in *Alford v. U.S.*, 1931, 282 U.S. 687, 51 Sup. Ct. 218, 75 L. Ed. 624.

> "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them."

As stated in *Asgill v. U. S.*, 4th Circuit, 1932, 60 Fed. 2d 776:

> "* * * the idea that lies at the bottom of all cross-examination (is) * * * that it is designed, not only to develop the facts of a case, but to test the witness in matters of recollection, of prejudice or bias, and of truthful statement."

Hill was the key witness and in attempting to impeach the credibility of such a highly important witness, the defense

was aiming at the heart of the Government's case. The proffered line of cross-examination made for producing results which would have made a difference in the jury's appraisal of this witness. The witness had been sentenced to a considerable length of time on two counts. He then gave statements to the Government which implicated the Petitioner herein, then he is later sentenced on two different counts arising out of the same transaction and then all the sentences were reduced to a term of approximately five (5) years. Whether leniency was expected by the witness Hill for his statements may have produced the impetus for his testimony on direct examination. Petitioner does not, of course, know whether such was the case but the defense was entitled to an opportunity to show that it was. As stated in *Gordon v. U. S.*, 344 U. S., page 422, 73 Sup. Ct. 369:

> "The importance of cross-examination here is that it enables the jury to determine what effect, if any, the postponement of sentence and release on recognizance had upon the mind and conduct of the witness."

The reason why the Constitution of the 6th Amendment of the United States provides that in all criminal cases the accused must be confronted by the witnesses who testify against him is that the defendant may exercise the right of cross-examination. Necessarily the object of cross-examination is to break or weaken the force of the testimony given by the witness on his examination. From this is follows that any matter which would have a tendency to lessen the credibility of a witness is a proper matter of inquiry on cross-examination; so, also is anything which tends to show that in the circumstances in which he is placed he has a strong temptation to swear falsely. Mr. Wigmore says that the right

of cross-examination is "beyond doubt the greatest legal engine ever invented for the discovery of the truth."

The Court in the case at bar not only limited the cross-examination of the Government's key witness, Hill, but also throughout the Court's remarks strengthened the credibility of Hill by the Court's statements heretofore set out above. This type of testimony from the Court obviously bolsters the credibility of this witness because it is in fact stating that any testimony offered by any Government witness that the witness's testimony is given free and voluntary. This indication of the trial judge's thoughts invales the province of the jury and necessarily prejudices the Petitioner. It is the universal rule in such cases that the trial judge must maintain an atmosphere of impartiality. *U. S. v. Carmel*, 267 F. 2d, *Baker et al. v. U. S.*, 156 F. 2d 386.

> "It is of the essence of a 'fair trial' that the judge conduct it with complete disinterestedness, and if he fails to do so, the judgment will be reversed."

The influence of the trial judge on the jury is necessary and properly of great weight and he would not say anything or ask any questions which might have the effect of prejudicing the cause of either party before whose duty it is to decide the issues. Therefore, it would seem that when one considers the acts of the trial judge in bolstering the credibility of the Government's witness the only conclusion possible would be that the trial judge thereby abused his discretion and prejudiced the rights of the Petitioner to a fair trial.

The Petitioner argues that the errors assigned in this Proposition possessed an influencing affect upon his jurors, and entitled him to a reversal by the review court. In the case of *Homas v. U. S.*, 279 F. 2d 767, 1960, the Court stated as follows:

"Errors of trial court which might be prejudicial in close criminal case, in sense of being capable in such situation of possibly affecting result, can well be without any such rational possibility in a strong case, and may not thus entitle defendant to reversal of his conviction but reviewing court must be able to say with fair assurance that error complained of could not, with natural operation in total setting and proceedings had, be regarded as having an influencing effect. Fed. Rules Crim. Proc., Rule 52(a), 18 U.S.C.A."

PROPOSITION III

THAT THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION.

The testimony of the key witness, Hill, who incidentally was the only witness to testify against the Petitioner Bishop except Lawrence (who stated he saw Bishop for a short period of time in the motel room at Clarkesville, Tennessee) is the only witness who tries to place the Petitioner Bishop in the conspiracy and in the delivery and attempt to sell counterfeit money. Even the key Government witness Hill's testimony is vague and uncertain in that the only time he ever saw the Petitioner Bishop was just prior to his transporting Hill and Nipp to Clarkesville, Tennessee, which can safely be said that all Hill's dealings in relationship to the counterfeit money was with the appellant Nipp and not the Petitioner Bishop.

There is not a scintilla of evidence to show that the Petitioner Bishop ever conferred or was counseled with in the relationship of transferring counterfeit moneys. The only time Bishop was ever present was when he flew Nipp and Hill to Clarkesville, Tennessee and back again, after his study of all the testimony, Bishop's roll was no more than that of a common carrier as he did not participate in any

of the handling, transferring or sale of the counterfeit moneys. In fact, all of Bishops acts were as consistent with innocence as that of guilt. Bishop left Nipp and Lawrence at Clarksville, Tennessee and went to Caro, Illinois where he picked up his plane and then landed at Clarksville, Tennessee, where he picked up Nipp and left Lawrence and Hill in Clarkesville, Tennessee. Bishop, upon arriving in route to Clarkesville, Tennessee, and landing at Caro, Illinois, because of inclement weather, rented a car in his own name, bought gasoline at the Caro, Illinois airport in his own name; these are acts of a person trying not to conceal or be secretive about his acts but that of a common carrier who is giving his clientel the services that are required of him. As stated in *U. S. v. DiRe*, 332 U. S. 581, 92 L. Ed. 210, 219:

> "An inference of participation in conspiracy does not seem to be sustained by the facts peculiar to this case. The argument that one who accompanies a criminal to a crime rendevous cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hideout, but in broad day light, in plain sight of a passerby, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal * * * Presumption of guilt are not lightly to be indulged from meetings."

There is not one bit of testimony, either through Hill or through any other witness, that connects Bishop in a conversation about the sale of counterfeit moneys. That he was around or in close proximity to conversation about the delivery or sale of counterfeit moneys is not sufficient to show that he participated in the conspiracy. There must be some overt act in connection with the possession and sale of counterfeit money by the Petitioner Bishop to connect him with

the crimes charged in the indictment in the above entitled cause. The only other time Hill saw Petitioner Bishop was when, through Hill's testimony, he met Bishop and Nipp at the Ramada Inn, Tulsa, Oklahoma. Bishop denied this meeting and produced three witnesses who testified that between the hours of 10:00 and 12:00 A.M., on the 24th day of January, 1967, Bishop was at the Riverside Airport, Tulsa, Oklahoma, (C-m. 201, 238, 248) and it would have been impossible for him to have been at the Ramada Inn, a distance of some ten (10) miles from the Riversile Airport, Tulsa, Oklahoma, and again the key witness Hill is vague and uncertain in that he testified he did not know who, whether Bishop or Nipp, gave him the counterfeit moneys with which he was later arrested. (C-m. 78) As stated in *United States v. Litberg*, 175 F. 2d 20:

> "The principal contention before this Court argued with vigor and apparent sincerity, is that the evidence is not sufficient to support the judgment. Such a contention, where the proof in support of an essential element of the crime is doubtful and particularly where it depends on inferences drawn from circumstances in proof, presents a difficult and perplexing problem for a Court of review. On the one hand, we must keep in mind the oft repeated rule that the weight and credibility to be attached to the testimony of the witness is a matter for the trier of the facts and that we are required to take view of the evidence most favorable to the Government. On the other hand, while the trier of facts is entitled to draw all reasonable inferences from the circumstances in proof, a Court of review is charged with the responsibility of determining the reasonableness of such inferences. In other words, an inference may not properly be relied upon in support of an essential allegation if an opposite inference may be drawn with equal consistancy from the circumstances in proof. In United States v. Tatcher, 3 Cir., 131 F. 2d 1002, 1003, the Court revers-

ing a conviction based on inferences stated:

"To justify conviction of crime where the evidence re lied upon is circumstantial in nature, the evidence must be such as to exclude every reasonable hypothesis but that of guilt. United States v. Russo, 3 Cir. 1941, 123 F. 2d 420. As we have seen the evidence relied upon to sustain the appellant conviction is as consistent with his innocence as with his guilt."

In the case at bar, the witness Hill was the only witness to implicate the Petitioner in Counts I and II of the indictment and as heretofore mentioned there were three witnesses produced to rebutt this testimony. It is the Petitioner's contention that this testimony should have in some way been corroborated by the Government in order to find the Petitioner guilty as to Counts I and II of the indictment or at least give the accomplice testimony instruction that the accomplice's testimony should be received with caution and especially in the case at bar in that the trial court limited the cross-examination of the accomplice, Hill.

As stated in *Stephenson v. United States of America*, 211 F. 2d 702, wherein it held that the conspiracy fixed the status of a witness as that of accomplice and required the giving of cautionary instruction.

Circuit Judge Orr stated:

"Under the circumstances of this case, the failure of the Court to give the accomplice testimony instruction is such plain error as to impel us to notice it under the provisions of Rule 52(b). Federal Rules of Criminal Procedure, Title 18 USCA. From a reading of the whole record it affirmatively appears that such failure was highly prejudicial to appellant. Bihn v. United States, 1946, 328 U. S. 633, 66 S. Ct. 1172, 90 L. Ed 1485. The Government's case rested almost entirely upon the testimony of accomplice Tester, the thief. The

> jury should have had the benefit of the instruction in order to enable them to properly evaluate that testimony. We cannot say 'with fair assurance after pondering all that happened' that the judgment in this case would not have been different had the instruction been given. Kotteakos v. United States, 1946, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557."

In those jurisdictions where it is the rule that the uncorroborated testimony of an accomplice is insufficient to support a conviction, it is the duty of the court, in the absence of any testimony corroboratory of an accomplice, to direct a verdict of acquittal. *United States v. Murphy* (1918), 253 Fed. 404; *Reynolds v. State* (1912) 14 Ariz. 302, 127 Pac. 731.

As set forth in *Title 22 O.S. 1961, Section 742*:

> "A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof."

As set forth in *Stephenson v. U.S.A., supra*, it was stated:

> "We find no reference in said rules (Federal Rules of Criminal Procedure) to the giving of cautionary instructions as to an accomplice's testimony. On the contrary, the Alaska statute, requiring such an instruction, is wholly consistent therewith and deals with a subject outside the scope and coverage of the Federal Rules of Criminal Procedure. In addition, the Federal Rules of Criminal Procedure seem to require the trial court to comply with the Alaska statute.
>
> Procedure not otherwise specified: If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute." Rule 57(b) Federal

Rules of Criminal Procedure, 18 U.S.C.A.

The Petitioner respectfully submits that the trial court was under the same duty as set forth in *Stephenson v. U. S. A.,, supra,* to compel the Government to corroborate testimony of the accomplice or direct a verdict for acquittal, or in the alternative, at least to give cautionary instruction as to the testimony of accomplice. It should further be noted that almost all jurisdictions (states) the statutes provide that the testimony of accomplice be corroborated.

Petitioner submits that the failure of the Court to direct a verdict or give cautionary instruction is in violation of his Constitutional Rights as set forth in the 6th Amendment of the United States Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that this Court grant this petition for writ of certiorari.

Respectfully submitted,

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Filed United States Court of Appeals, Tenth Circuit, Dec. 2, 1969. William L. Whittaker, Clerk.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NOVEMBER 1969 TERM

No. 8-69

GALE KENNETH NIPP,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 9-69

ELDRIDGE H. BISHOP,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(District Court No. 68-CR-58)

Mickey D. Wilson, Tulsa, Oklahoma, for Appellant Nipps. Elmore A. Page, Tulsa, Oklahoma (Thomas G. Hanlon, Tulsa, Oklahoma, with him on the Brief), for Appellant Bishop. Lawrence A. McSoud, United States Attorney (Robert P. Santee, Assistant United States Attorney, with him on the Brief), for Appellee. —

Before HILL and SETH, Circuit Judges, and THEIS, District Judge.

SETH, Circuit Judge.

The appellants, together with a third party, Reecil Wayne Gravitt, were jointly indicted on three counts. The first count charged only the two appellants with aiding and abetting one Dors Lee Hill in the possession and attempt to sell counterfeit federal reserve notes. Count two of the indictment also charged the two appellants with aiding and abetting the same person in delivering counterfeit federal reserve notes with the intent that they be passed. The third count of the indictment covered the appellants, the third party, and others under a conspiracy charge to pass, sell, or attempt to sell, and keep in their possession, and conceal counterfeit federal reserve notes.

A jury trial was held, and the appellants together with the defendant Gravitt were found guilty as charged. The appellants thereupon took separate appeals which have been consolidated for hearing and disposition.

The appellants urge that the trial court was in error in that it limited cross-examination by the appellants of the principal witness for the Government. Appellants also assert that they should have been provided in advance of the trial the names of the witnesses to be used by the Government, and also a transcript of the grand jury proceedings. Other asserted errors relate to the instructions and the sufficiency of the evidence. Some detailed recitation of the facts is necessary in view of the points raised on appeal.

The witness, Dors Lee Hill, and other witnesses for the Government testified as to various meetings and transactions among the parties charged. This testimony shows that the witness Hill met with defendant Gravitt and appellant Nipp in January 1967, and a discussion took place concerning a small number of counterfeit $100 bills. These bills were then in the possession of appellant Nipp and he thereupon sold ten of such notes to witness Hill for $300.00. The witness told appellant Nipp at this time that he could

dispose of the entire number of bills that were available to Nipp in the face amount of $220,000.00. Shortly after this meeting, the witness Hill and defendant Gravitt met again. Thereafter the witness Hill went to Chicago to arrange for the sale of the counterfeit bills and there met with the prospective buyers and made arrangements for the sale to take place in Clarksville, Tennessee. About January 11th or 12th, the witness Hill met with appellant Nipp and defendant Gravitt in Tulsa, Oklahoma. The witness testified that he saw appellant Bishop in the car outside the motel at that time. The witness, together with the appellants, traveled to the home of the witness in Sapulpa preparatory to the trip to Clarksville, Tennessee.

The witness Hill and the appellants were to travel to Clarksville, Tennessee, in an airplane apparently owned by the appellant Bishop and piloted by him. The witness Hill testified that en route to the airport, the three of them discussed the amount of the counterfeit money they were then taking to Clarksville. The three started out for Clarksville in the plane, but it was necessary for them to land at Cairo, Illinois. Appellant Bishop there rented a car in his own name and the three drove to Clarksville and registered at the motel. This witness testified that after arrival at the motel, the three of them, Nipp, Bishop, and Hill, counted the counterfeit money, set aside about $50,000.00 to be shown to the prospective purchaser by the witness Hill. This was done. One of the purchasers did not appear and the parties waited for him into the next day. However, appellant Bishop returned the rental car to Cairo, picked up the plane, and flew to Clarksville. Soon thereafter the appellants left Clarksville by plane, leaving the witness Hill there to contact the missing purchaser. Thereafter the prospective purchaser contacted the witness Hill in Tulsa and a meeting was arranged to be held at the Tulsa airport for the sale of the counterfeit money. The witness called and arranged to have appellant Nipp provide him with the bills for the purchase. Prior to the purchase, the parties, Hill, Bishop, and Nipp, met and the

counterfeit bills were turned over to the witness for delivery to the purchaser at the airport. The plan was that the witness would proceed to the airport with the bills and he would be followed in another car by the appellants. An initial contact was made at the airport between Hill and the prospective Purchaser. The witness Hill returned to the parking lot and there discussed the matter further with the appellants. The witness then returned in his car to a taxi parking area in front of the airport where the exchange was to be made. When the witness sought to make the sale, he was thereupon arrested. The appellants were not then arrested as they were waiting in the parking lot for the return of Hill.

The first asserted error advanced by appellants relates to the transcript of the grand jury proceedings. As indicated above, they urge that they were entitled to a copy of the transcript of such proceedings. The record shows that the testimony given before the grand jury which handed down the indictment was not recorded. There is no requirement that the proceedings of a grand jury be recorded and no error may be predicated upon the fact that a transcript was not provided when no transcript was taken. Wyatt v. United States, 388 F.2d 395 (10th Cir.); Thompson v. United States, 381 F 2d 664 (10th Cir.); McCaffrey v. United States, 372 F.2d 482 (10th Cir.)

The appellants also assert that they should have been provided prior to trial with the names of the witnesses who were to appear for the Government. The trial judge upon a motion declined to require the Government to provide the names of the witnesses. They acknowledged that there is no statutory authority for their position, and there are no decisions which require the names to be furnished in non-capital cases. The appellants cite cases wherein it is held that the courts have inherent power to compel discovery and that this power includes the disclosure of the names of the Government witnesses. We have considered the issue and related issues in several recent cases. These

include Edmondson v. United States, 402 F.2d 809 (10th Cir.); United States v. Gleeson, 411 F.2d 1091 (10th Cir.), and most recently, United States v. Eagleston, ____ F.2d ____, (10th Cir.), No. 114-69. See also 44 F.R.D. 527. In these cases, we have held that it is not error for the trial court to refuse to order the production of the names of the witnesses to appear for the Government in non-capital cases. The inherent authority issue has not been separately considered and is not so considered here.

As to the asserted limitation on cross-examination by appellants of the witness Hill, the record shows that this witness, as indicated in the outline of the facts, was the active party in the arrangements for the sale and in its attempted culmination. He appeared as a witness for the Government, and upon cross-examination he was asked about charges that had been brought against him. He testified that he had been found guilty of possession of counterfeit money and the sale thereof and had received two concurrent sentences, the longest of which would run fifteen years. He also had been charged with the possession of stolen money orders and under the Dyer Act. He entered a plea of guilty to these charges and received sentences to run concurrently with the counterfeiting sentences. All of his sentences were however thereupon reduced to five years, four months, and four days by the district judge who was also the trial judge during the course of the trial here appealed from. The record shows that the reduction of the sentences of the witness Hill took place before the trial of the appellants herein. This witness was asked on cross-examination by appellants about his statements given to the Government preparatory to the trial in relation to the reduction of his sentence. The record shows that this

was fully developed.[1] The attorney for the appellants was permitted to cross-examine on the point. The relationship of the statements and the sentencing of the witness was described for the jury. There was nothing further relative to the matter that could properly have been the subject of the cross-examination, and we find that the limitation placed by the trial court was not improper.

The same matter was later brought up during further cross-examination of the same witness. Counsel for the appellants inquired again into the reduction of the sentence. The court then advised counsel that this had already been developed before the jury and the court again told the at-

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1. "Q. Yes, sir. And after you made those statements your sentence was cut to five years, wasn't it?

"A. Yes, it was cut.

"Q. Yes, sir. And those statements involved these defendants, did they not?

"A. That statement?

"Q. Yes.

"A. Yes.

"Q. In other words, you sold them out for ten years, didn't you?

"MR. RITCHIE: If the Court please, I think that's a little bit —

"THE COURT. The Court overrules the objection.

"By Mr. Page.

"Q. In any event, you did have an interest in your statement, didn't you?

"A. Yes.

"Q. Yes, sir. All right. That was to try to save you some time, that's why you made that statement?

"THE COURT. Well, I think that brings the Court into this play. Mr. Page. To the jury. I want to say that the sentence was reduced, not for anything that he ever said or did, but it was reduced at the time he entered a plea of guilt [sic] to the Dyer Act and to the postal money orders, more because of his naval record, as I remember it, and that has been almost a year ago, and because of his health.

"You may proceed."

torney the reason why the sentence had been reduced.[2] Again the matter was fully explained for the benefit of the jury, and if the action of the trial court constituted a limitation on further questioning, it was entirely proper as the position and interest of the witness were clearly before the jury at that time.

As an issue related to the next preceding one, the appellants urge that they were likewise limited in their presentation to the jury of this same subject by directions given by the trial judge. The record shows that counsel for the defendants were advised prior to the closing argu-

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2. "Q. And then after you were convicted in this court and given fifteen years, thereafter it was reduced to five years, and all of these crimes, five years, four months, three days?

"THE COURT. Hasn't that all been before the jury?

"MR. BRIGGS. Yes, your Honor, it has.

"THE COURT. What is the point? The jury understands that.

"MR. BRIGGS. I want to ask him when it was that he decided, your Honor, that he could trade somebody else's liberty for his own.

"THE COURT. Now wait a minute. Now wait a minute. Let's keep the record straight. He hasn't traded anybody's liberty for anybody. The Court made that on the Court's own motion.

"MR. BRIGGS. I understand that, your Honor.

"THE COURT. I don't want any more of that kind of talk, and I am not going to have it. You understand?

"MR. BRIGGS. I understand your Honor.

"THE COURT. I reduced this sentence and I told you why, and I did it in open court.

"MR. BRIGGS. Yes, your Honor.

"THE COURT. And I haven't talked to anyone about this lawsuit; and don't you say anything like that any more.

"MR. BRIGGS. No, your Honor, and I don't — please, I don't want the Court to misunderstand. I don't think —

"THE COURT. (Interposing) I don't want to be misunderstood either.

"MR. BRIGGS. I do not think the Court was informed at the time when the sentence was reduced with reference to these other matters.

"THE COURT. I know why I reduced it.

"MR. BRIGGS. Yes, your Honor.

"THE COURT. And I reduced it in my own heart on the own circumstances and the own record.

"MR. BRIGGS. I understand, your Honor.

"THE COURT. Not anything that he said to anybody at any time at any place."

ments that their argument on this point would be restructed in that they could not argue that the testimony of the witness Hill was given in exchange for the reduction of his sentence.[3] This direction by the trial judge did not prohibit any mention of the interest of the witness Hill which had already been demonstrated by cross-examination, but it only prohibited what would have been an incorrect reference that the reduction had been given as a trade. The trial judge had told the jury and counsel the reasons for the reduction in the sentence of the witness Hill, and the time when the sentence was reduced. Any comment or reference to a trade would have been incorrect, and the trial court was proper in instructing the counsel not to so argue. They certainly would have been free to again point out to the jury the relationship of the witness to the parties, and the fact that he had already been sentenced and the original sentence reduced, and that he was then in prison. We find no improper or undue limitation upon the closing arguments of counsel.

Appellants urge that there is insufficient evidence to sustain the conviction of the appellants. We have examined the record and find that substantial evidence was produced to support the conviction. The proper rule was long ago set out by this court in Wilder v. United States, 100 F.2d 177 (10th Cir.). See also Mason v. United States, 408 F.2d 903 (10th Cir.); McGee v. United States, 402 F.2d 434 (10th Cir.), and Nolan v. United States, F.2d (10th Cir.) No. 9730. In this connection, it should be borne in mind that the appellants were charged in the initial counts with

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3. "THE COURT. Well, if I recall right, this was a conference between attorneys and the Court with reference to what should be the instructions to the jury, and if I recall, I did say to the attorneys that I did not want them to say the reduction in sentence the Court had given to Mr. Hill was in trade for his testimony, that the reduction given Mr. Hill was on the Court's own motion.

"MR. PAGE. That's right.

"THE COURT. And for you to say that he came testifying in the light of a trade would be wrong, that if you did I would have to call you down.

"MR. PAGE. That's right."

aiding and abetting. The implication of the appellant Bishop is perhaps less extensive than that of the appellant Nipp. However, testimony of the witnesses placed Bishop at the several places and with the other parties at the critical times, and the testimony of the witness Hill directly implicates Bishop as a participant. It is apparent that the jury believed the testimony of the witness Hill in this respect and on other points.

We also find no error in the instructions. Clearly the instructions did not permit the jury to find the appellants guilty merely on the basis of association with the conspirators. Butler v. United States, 197 F.2d 561 (10th Cir.). See also Jones v. United States, 365 F.2d 87 (10th Cir.). The law relative to conspiracy was plainly set out in the instructions, and a further instruction was given directly upon the matter of bare association with the participants. This instructed the jury that mere similarity of conduct among various persons and the fact that they may have been associated with each other and may have been together and discussed common interests did not necessarily establish proof of the existence of a conspiracy. This instruction directly met the association issue raised by the appellants.

The appellant Nipp, who did not testify, raises an additional issue. This concerns the admission of an exhibit which was a copy of a report made by a Secret Service agent. The report related to the investigation which had been proceeding for some time and to the activity of the defendants. The admission of the report was duly objected to, but it was admitted. This report in part states that appellant Nipp had been under investigation, and he urges that this reference constituted evidence as to his character when none had been introduced by him, and therefore the admission of the exhibit was error. The portion of the report of the investigator which indicated that the appellant was suspect did not for the purposes of the rule constitute a reflection on the character of the appellant. It wa

apparent throughout the trial that the matter had been under investigation for an extended period of time and the participants were known to the authorities. The exhibit does not refer in any way to the reputation of the appellant for truth and veracity, and we find no issue as to reputation raised thereby.

We find no error, and the case is therefore AFFIRMED